

No. 2570

United States
Circuit Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY
COMPANY, a Corporation; CHICAGO, MILWAU-
KEE & PUGET SOUND RAILWAY COMPANY,
a Corporation; J. E. WOODS and M. I. CHAPPELL,
Plaintiffs in Error,
vs.

DAVID CLEMENT, as Administrator of the Estate of
DAVID CLEMENT, JR., Deceased,
Defendant in Error.

Petition for Rehearing

Upon Writ of Error to the United States District Court
of the District of Montana

Filed

NOV 14 1915

F. D. Monckton,

Clerk.

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PETITION FOR REHEARING.

Now comes the defendant in error in the above entitled cause, and respectfully presents this, his petition for rehearing in the said cause upon the merits, and submits the following reasons why his petition should be granted:

I

This is an action instituted under Section 6494 of the Revised Codes of Montana, 1907, by the administrator of the estate of David Clements, Jr., to recover for injuries sustained by said David Clement, Jr., and from which injuries he thereafter died, it being alleged in the complaint that said injuries were caused by the negligence of the defendants.

II

It is alleged in the complaint that the said David Clement, Jr., was a strong and able-bodied lad of fifteen years of age, of good capacity for and disposition to work, and would have earned much money after he became twenty-one years of age, and would have enjoyed a long and happy life; and that he lived an appreciable length of time after the accident and that the cause of action has survived to his administrator.

III

The statute under which this action was instituted, Section 6494, Revised Codes of Montana, 1907, gives to the personal representative of the decedent the right to prosecute and maintain the same action that the decedent could have maintained had he lived; that is, not only the right to maintain an action for pain and suffering, when the decedent lived an appreciable length of time after receiving the injuries, but also the right

to maintain an action for any impairment of his earning capacity when the decedent lived an appreciable length of time after receiving the injuries.

Beeler vs. Butte & London Copper Dev. Co., 41 Mont. 465;

Dillon vs. Great Northern Ry. Co. 38 Mont. 485;

Melzner vs. Northern Pacific Ry. Co. 46 Mont. 162;

Keys vs. Valley Tel. Co. 132 Mich. 281;

Oliver vs. Houghton Co. St. Ry. Co. 134 Mich. 367.

IV

On the trial of this action, without objection on the part of the plaintiffs in error, defendants below, evidence was introduced, and considered by the jury, showing the expectancy of life of a person fifteen years of age and the amount of money required to purchase for a person twenty-one years of age an annual income of one hundred dollars per annum.

Witness Fenner, Trans. p. 113.

V

The defendant in error, plaintiff below, also introduced on the trial of this action evidence showing that the decedent lived an appreciable length of time after receiving the injuries which caused his death. The witness Chappel testified, in substance, *that he crossed the drawheads between the engine and the first car and then travelled two car lengths, between 72 and 80 feet, to where he found the boy between the rails underneath the drawheads of the second and third cars, and that when he reached the boy he was gasping a little, frothing at the mouth, as if in his last struggles for life.* This evidence having been apparently overlooked by the court.

Witness Chappel, Transcript pp. 52-53.

VI

The court apparently misconstrued the interpretation placed upon Section 6494, Revised Codes of Montana, 1907, under which this action was instituted. The cases cited by the court in its opinion are based upon statutes where a recovery could only be had for conscious pain and suffering, while the Supreme Court of the State of Montana, in construing the Montana statute, has held that while under that statute, conscious pain and suffering may be included as an element of damage it does not necessarily have to be so included, and a recovery may be had for injuries impairing earning capacity when the person injured lives an appreciable length of time after receiving the injuries.

Beeler vs. Butte & London Copper Dev. Co., 41
Mont. 465.

VII

No evidence whatever was introduced by the defendant in error, plaintiff below, on the trial of this action, for the purpose of showing any pain or suffering by the decedent between the time he received the injuries and the time of his death, the evidence introduced being for the express purpose of showing that the decedent lived an appreciable length of time after receiving the injuries, his expectancy of life and the amount he would have been entitled to recover by reason of the impairment of his capacity to earn money if he had survived his injuries.

VIII

The damages which the jury awarded the defendant in error, plaintiff below, were not for the decedent's pain and suffering between the time the injuries were received and his

death, but for the impairment of his earning capacity caused by the injuries from which, after an appreciable length of time, he died.

IX

The damages awarded having been for the impairment of the decedent's earning capacity and not for pain and suffering, the judgment should have been affirmed.

WHEREFORE, we respectfully ask that a rehearing be granted and that the case be reconsidered upon its merits.

BURTON K. WHEELER,
A. A. GRORUD,
HOMER G. MURPHY,

Solicitors for Defendant in Error.

I, Burton K. Wheeler, one of the solicitors for the defendant in error, do hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that the same is not interposed for delay.

B. K. Wheeler

Of Solicitor for Defendant in Error.

Service of above and foregoing petition for rehearing admitted and copy thereof received this 29th day of October, 1915.

Shelton & Furman

A. J. Verheyen

Solicitors for Plaintiff in Error.